

ROBERT H. COVINGTON ET AL.

IBLA 81-383, etc.

Decided June 22, 1981

Appeal from decisions of the Alaska State Office, Bureau of Land Management, rejecting various noncompetitive oil and gas lease offers.

Affirmed.

1. Alaska: Oil and Gas Leases -- Alaska National Interest Lands Conservation Act: Generally -- Oil and Gas Leases: Lands Subject to -- Wildlife Refuges and Projects: Leases and Permits -- Withdrawals and Reservations: Effect of

An offer to lease for oil and gas in the Arctic National Wildlife Refuge is properly rejected where the lands in the refuge have been withdrawn from the operation of the mineral leasing laws by either secs. 1002 or 1003 of the Alaska National Interest Lands Conservation Act. Standard offers to lease for oil and gas may not be construed as requests to undertake exploratory activities only. The only exploratory activities permitted in the Arctic National Wildlife Refuge are governed by sec. 1002 of the Act. Any requests to undertake exploratory activities are premature until the Secretary of the Interior has issued guidelines governing exploration in the refuge.

2. Alaska: Oil and Gas Leases -- Words and Phrases

"Leasing." The word "leasing" in the phrase "no leasing * * * leading to production of oil and gas" in sec. 1003 of the Alaska National Interest Lands Conservation Act includes leasing for the purpose of exploratory activities.

APPEARANCES: Robert H. Covington, Alice L. Doyle, William T. Engwall, Margaret J. Engwall, Paula M. Benepe, John P. Culhane, Carl W. Lind, Gerald J. Culhane, Michael W. Morey, Thomas R. Culhane, Sherman G. Reynolds, Raymond E. Plummer, Jr., Duane R. Gorder, Lloyd Swenson, J. Michael Schachle, Stephen A. Schachle, Kevin R. Gorder, pro sese; Robert R. Johnson, pro se, and for Paul N. Johnson and Edward J. Young; John Bradbury, Esq., Anchorage, Alaska, for Steve C. Holland.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Appeals have been taken from decisions of the Alaska State Office, Bureau of Land Management (BLM), rejecting oil and gas lease offers because the lands sought are within the Arctic National Wildlife Refuge (ANWR). 1/ The decisions indicate that section 1003 of the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487 (Dec. 2, 1980), 94 Stat. 2371, 2452 (to be codified at 16 U.S.C. § 3101, 3143), prohibits the development of oil and gas in the refuge and thus, by mandate of the Congress, the Secretary of the Interior has no authority to issue oil and gas leases for lands within the refuge.

1/ For a list of appellants and lease offers, see Appendix A.

Because the identical situation is present in each appeal and because of the very great similarity in the statements of reasons submitted by the several appellants, we have, sua sponte, consolidated the appeals for consideration.

As a preliminary matter, we wish to comment on the appellants' contention that since the BLM decisions are based on the premise that the "Secretary has no authority to issue oil and gas leases within the Arctic National Wildlife Refuge," the decisions must be reviewed only on that basis and not on any other contentions which might have been made by BLM. It is well established that the Secretary of the Interior has broad plenary powers over disposition of public land and their resources, and that throughout the appeals process, so long as legal title to the land remains in the Government, there is continuing jurisdiction in the Department to consider all issues on land claims. Schade v. Andrus, 638 F.2d 122 (9th Cir. 1981); Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364, 1367 (9th Cir. 1976). See Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920). Upon assuming jurisdiction of an appeal, the Board of Land Appeals, as the authorized representative of the Secretary of the Interior, exercises his authority to consider the entire record in making a decision and the review is not limited to the theories of law upon which the parties have proceeded theretofore. United States v. Gassaway, 43 IBLA 382 (1979). Appellants' reliance upon SEC v. Chenery, Corp., 318 U.S. 80 (1943), is misplaced. The BLM decisions are not "agency decisions" as that term is used in Chenery, supra. The decision of this Board will be the "agency decision."

In their statements of reasons, appellants argue that BLM has misinterpreted section 1003 of ANILCA and urge that it does not interdict all leasing within the Arctic National Wildlife Refuge but only prohibits leasing which will lead to production of oil or gas. They contend that the Secretary is empowered to issue leases limited to exploratory activities.

Appellants reason that if Congress had intended to prohibit all forms of leasing, section 1003 would have provided that "production of oil and gas from and leasing and development of the Arctic National Wildlife Refuge are prohibited." Alternatively, appellants suggest that if Congress intended such a result, it could have omitted section 1003 and leasing would then be governed by other provisions of ANILCA. Instead, appellants note that Congress added "a separate oil and gas leasing section which specifically and exclusively governs the ANWR and which contains a clause barring only those forms of leasing and development 'leading to production.'" Appellants further contend that had Congress intended an outright prohibition of all leasing it would have used the language of total withdrawal typically applied to bar activity on public land. ^{2/} They note as well that section 1002(h)(6) states that the Secretary is required to recommend to Congress what areas should be opened "to development and production" of oil and gas

^{2/} The language typically employed to effect a withdrawal of the public domain is "withdrawn from all forms of appropriation or disposal under the public land laws, including location, entry and patent under the mining laws and from operation of the mineral leasing laws," and variations thereof.

and urge that, since the provision "does not ask for recommendations on which lands should be opened to leasing," the omission must mean that the refuge is already open to leasing.

Appellants continue by noting that Title X of ANILCA establishes a system intended to encourage exploratory activities by private parties and to provide Congress with adequate information to make an informed decision on the ultimate development of oil and gas in the refuge including the coastal plain. Finally, appellants suggest that Title X favors private parties for exploratory activity but the costs incurred by those parties will be high. Thus private parties must be given some incentive to participate in the exploration of ANWR. Appellants conclude:

Unless the Secretary authorizes exploratory leases pursuant to Section 1003, there will be no significant incentive for private exploratory activity. Therefore, the Secretary should exercise his authority to issue exploratory leases, which grant the holder the exclusive right to explore the designated area and which guarantee the holder the first option to develop those lands ultimately opened to development.

[1, 2] After a thorough review of the applicable provisions and legislative history of ANILCA, we conclude that appellants have selectively examined Title X and conveniently ignored pertinent provisions of the title and that, therefore, their assessment of section 1003 and of the management scheme set out by the Congress for the Arctic National Wildlife Refuge is incorrect.

Title III of ANILCA establishes or redesignates various significant wildlife resource areas, including the Arctic National Wildlife Refuge, as units of the National Wildlife Refuge System. Section 304, which provides for the administration of the refuges generally, states in part that all public lands in each refuge are "withdrawn, subject to valid existing rights, * * * from all forms of appropriation or disposal under the public land laws, including location, entry and patent under the mining laws but not from operation of the mineral leasing laws" (section 304(c)). (Emphasis added.) The section also directs that the Secretary of the Interior not permit any use, including oil and gas leasing, in the refuge "unless such use * * * is compatible with the purposes of the refuge" (section 304(b)).

Section 702 of Title VII of ANILCA designates portions of units of the National Wildlife Refuge System as wilderness in accordance with the Wilderness Act, 16 U.S.C. §§ 1131-1136 (1976). Wilderness areas are generally open to mineral leasing until December 31, 1983. 16 U.S.C. § 1133(d)(3) (1976).

Title X of ANILCA reflects the particular determination by the Congress that a decision as to oil and gas development in the Arctic National Wildlife Refuge be made only with adequate information and the full participation of the Congress. Following hearings on Alaska lands legislation, Congress was acutely aware that available information was conflicting and uncertain as to the extent of oil and gas resources in the refuge and as to the effect that oil and gas development would have on the widely recognized wildlife and wilderness values of the refuge.

S. Rep. No. 413, 96th Cong., 1st Sess. 240-41 (1979), reprinted in [1981] U.S. Code Cong. & Ad. News 9244-45.

Title X, as it pertains to the Arctic National Wildlife Refuge, requires a two-pronged evaluation of the resources of the refuge. Section 1001 directs the Secretary of the Interior to carry out a systematic interdisciplinary study of certain Federal lands in Alaska, including the Arctic National Wildlife Refuge. 3/ The study will assess potential oil and gas resources, review wilderness characteristics, study wildlife resources, and make recommendations as to future use and management of oil and gas resources, wilderness designation of the lands, and protection of the wildlife resources. The study and findings are to be submitted to the President and Congress no later than 8 years after enactment of ANILCA.

Section 1002 directs the Secretary to undertake a comprehensive and continuing assessment of fish and wildlife resources in the coastal plain of the refuge and an analysis of the potential impacts of oil and gas exploration, development and production on those resources. Section

3/ Section 1001(a) states:

"The Secretary shall initiate and carry out a study of all Federal lands (other than submerged lands on the Outer Continental Shelf) in Alaska north of 68 degrees north latitude and east of the western boundary of the National Petroleum Reserve -- Alaska, other than lands included in the National Petroleum Reserve -- Alaska and in conservation system units established by this Act."

Although all units of the National Wildlife Refuge System are by definition conservation system units (see section 102(4)), the intent of Congress is clear that the lands in the Arctic National Wildlife Refuge are to be included in this study. S. Rep. No. 413, 96th Cong., 1st Sess. 239-40 (1979), reprinted in [1981] U.S. Code Cong. & Ad. News 9243-44.

1002 further authorizes a closely regulated program of exploratory activities on the coastal plain with the aim of identifying, by means other than drilling, those areas having oil and gas production potential and of estimating the volume of oil and gas within the coastal plain. The coastal plain is all of the nonwilderness portion of the refuge. Since it appears that all of appellants' lease offers fall within the coastal plain area, a closer examination of the details of Congress plan for the coastal plain is necessary.

Section 1002 first directs the Secretary to conduct a continuing study of fish and wildlife and their habitats with an initial report to be published within 18 months after December 2, 1980, the date of enactment of ANILCA (section 1002(c)). In addition, within 2 years after enactment, the Secretary shall establish, by regulation, initial guidelines governing exploratory activities on the coastal plain (section 1002(d)). After the initial guidelines are promulgated, any interested person and the Geological Survey may submit exploration plans to the Secretary for approval (section 1002(e)). Section 1002 prescribes specifically the procedures for plan approval, including publication of notice of any application and the text of the plan in the Federal Register and in newspapers of general circulation in Alaska. No exploration plan may be approved during the 2 years following December 2, 1980 (see section 1002(e), (f), and (g)). A report to Congress must be submitted after 5 years (section 1002(h)). Finally, and significantly, subsection (i) states: "Until otherwise provided for in law enacted after [December 2, 1980], all public lands within the coastal

plain are withdrawn from all forms of entry or appropriation under the mining laws, and from operation of the mineral leasing laws, of the United States." (Emphasis added.) We are not aware of any law enacted by the Congress since December 2, 1980, which provides for any abatement of the withdrawal effected by section 1002(i).

Section 1003, on which appellants rely almost exclusively to support their arguments that leasing for exploration purposes in the Arctic National Wildlife Refuge is not prohibited, reads as follows: "Production of oil and gas from the Arctic National Wildlife Refuge is prohibited and no leasing or other development leading to production of oil and gas from the range shall be undertaken until authorized by an Act of Congress."

We find first that activities in the coastal plain of the refuge are governed by the more specific provisions of section 1002, which withdraws those lands from the operation of the mineral leasing laws except for the limited program of exploratory activities set out therein.

Second, we find appellants' interpretation of the language of section 1003 unconvincing. The phrase "leasing * * * leading to production," in the context of the Department's mineral leasing program pursuant to the mineral leasing laws, must be given a broader interpretation. The ultimate goal in the leasing program is production. Leasing activities authorized upon the issuance of an oil and gas lease,

not involving a known geologic structure of a producing oil and gas field, necessarily include prospecting or exploring activities (see section 4 of the lease terms, Offer to Lease and Lease for Oil and Gas, Form 3110-1). Thus we conclude that the term "leasing" generally includes exploration activities. Contrary to appellants' assertion, we believe that if Congress had meant to prohibit only physical development and production, it would not have specifically used the term "leasing." 4/ This interpretation is the only one which is consistent

4/ Examination of the derivation of section 1003 supports our interpretation. The enacted language is a modified version substituted by the Senate for the original provision as found in House bill, H.R. 39, 96th Cong., 1st Sess., as reported by the House Committee on Interior and Insular Affairs, H.R. Rep. No. 96-97(I) (1979). The House bill left only nonwilderness lands in wildlife refuges subject to the operation of the mineral leasing laws. It designated a substantial portion but not all of the Arctic National Wildlife Refuge as wilderness. As part of a North Slope lands study, the Secretary of the Interior was directed to conduct an oil and gas exploration program on the nonwilderness portion of the refuge and then report to Congress. The original House version of section 1003 was a logical extension of the House scheme for the refuge. It read: "Production of oil and gas from the Arctic National Wildlife Refuge is prohibited and no development leading to production of oil and gas from the range shall be undertaken until authorized by an Act of Congress." Thus, for those nonwilderness lands in the refuge technically open to mineral leasing under the general provision of the bill, exploration was specifically authorized whereas development and production was prohibited. The Senate substitute bill left all lands in wildlife refuges open to mineral leasing. Section 1002 of the Senate bill directed a study and exploration program for only the coastal plain of the refuge and otherwise withdrew the coastal plain from the operation of the mineral leasing laws pursuant to section 1002(i). The Senate then modified the House version of section 1003 to include a prohibition against "leasing" as well as "development leading to production of oil and gas." Unlike the House provision, section 1003 of the Senate bill, which was later enacted, applies to those lands not specifically covered by section 1002. We conclude therefore that the Senate amended the House language so that the remaining lands in the refuge would be fully protected from oil and gas activities until Congress could make an informed decision as to whether to allow oil and gas activities in the refuge.

with the studies authorized by Congress to assess the wildlife resources and potential oil and gas resources of the refuge and the concern of the Congress that it be fully informed of the potential ramifications of oil and gas activities in the refuge.

Each of the rejected oil and gas lease offers was filed on BLM Form 3110-1, styled "Offer to Lease and Lease for Oil and Gas (Sec. 17 Noncompetitive Public Domain Lease)." The lease terms set forth on the form recite these rights of the lessee:

Section 1. Rights of lessee. -- The lessee is granted the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits, except helium gas, in the lands leased, together with the right to construct and maintain thereupon, all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipelines, reservoirs, tanks, pumping stations or other structures necessary to the full enjoyment thereof, for a period of 10 years, and so long thereafter as oil or gas is produced in paying quantities; subject to any unit agreement heretofore or hereafter approved by the Secretary of the Interior, the provisions of said agreement to govern the lands subject thereto where inconsistent with the terms of this lease.

A lease issued on this form expressly conveys the right to produce oil or gas. Appellants' use of this form does not comport with their present arguments that they seek only a lease limited to exploratory activity, but with concomitant priority to a lease authorizing production of oil or gas if and when such activity may be authorized. If, at the time appellants submitted their offers, they were not seeking the right to produce oil and gas pursuant to section 17 of the Mineral

Leasing Act, 30 U.S.C. § 226 (1976), they should not have used BLM Form 3110-1, a lease which provides such right.

Furthermore, under section 1002 of ANILCA, the Secretary has no authority to issue mineral leases, including oil and gas leases, within the coastal plain of the Arctic National Wildlife Refuge at this time and no authority to approve exploration plans for the area until 2 years after December 2, 1980. Section 1002(e) requires that any exploration plan submitted to the Secretary conform to guidelines established by the Secretary pursuant to this section. A necessary corollary, supported by the introductory language of subsection (e), 5/ is that no exploration plan may be submitted to the Secretary until after the Secretary has prescribed the regulatory guidelines for such exploratory activities.

We conclude that appellants' offers were properly rejected because the Secretary has no present authority to lease for oil and gas in either the coastal plain or the wilderness area of the Arctic National Wildlife Refuge. We reject appellants' assertion that their offers can be construed as offers to lease for exploratory activities. The statutory scheme is clear as to the steps which must occur before exploratory activities in the coastal plain may be undertaken. Submissions seeking the right to explore the coastal plain are premature at this time.

5/ Section 1002(e) begins:

"Exploration Plans. -- (1) After the initial guidelines are prescribed under subsection (d), any person including the United States Geological Survey may submit one or more plans for exploratory activity * * * to the Secretary for approval. An exploration plan must set forth such information as the Secretary may require in order to determine whether the plan is consistent with the guidelines."

In addition, we are not aware of any statute or regulation which would allow appellants' lease offers to remain pending until such time as it is determined that oil and gas leasing should be permitted on the subject lands. The longstanding rule of the Department is that applications may not be suspended to await possible availability of the land sought. Harold L. Anderson, 10 IBLA 293 (1973); William J. Colman, 3 IBLA 322 (1971). 43 CFR 2091.1.

Three appellants have suggested that BLM violated the terms of section 1009 of ANILCA by failing to include a statement as to the reasons that oil and gas leasing on the lands they sought would be incompatible with the purposes of the Arctic National Wildlife Refuge. We disagree. Section 1009 may not be read in isolation from the other provisions of ANILCA. The section presumes that the Secretary has the authority under the Mineral Leasing Act of 1920, supra, to lease and requires that in exercising the discretion to lease or not to lease in a wildlife refuge, which is not also a wilderness area, the Secretary state the specific reasons for any decision, including a statement on the compatibility of leasing with the purposes of the refuge. This is not the situation before us because here the Secretary does not have the authority to issue a lease.

Finally, several appellants requested that a hearing be held on the issues raised by these appeals. These issues do not involve disputes as to facts but rather involve questions of law: the interpretation of provisions of ANILCA and their applicability to appellants'

offers. Appellants have had ample opportunity to present appropriate legal argument in support of their appeals to this Board in their statements of reasons. The requests for a hearing are denied. 43 CFR 4.415. See John J. Schnabel, 50 IBLA 201 (1980); Dorothy Smith, 44 IBLA 25 (1979), and cases cited therein.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Alaska State Office are affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Anne Poindexter Lewis
Administrative Judge

APPENDIX A

<u>IBLA No./Appellant</u>	<u>Lease Offer</u>	<u>Lands Covered</u>
	(Umiat meridian)	
81-383	F 72806	T. 7 N., R. 38 E., sec. 24
Robert H. Covington	F 72807	T. 8 N., R. 33 E., sec. 24
	F 72808	T. 7 N., R. 31 E., sec. 8
	F 72809	T. 7 N., R. 26 E., sec. 1
81-397	F 72671	T. 9 N., R. 34 E., secs. 1-4, 9, 11, 15, 16, 21, 25, 28
Steve C. Holland		
	F 72672	T. 9 N., R. 35 E., secs. 1, 4-7, 16, 17, 20, 28, 36
	F 72674	T. 9 N., R. 39 E., secs. 20-23, 26, 29, 32, 35
	F 72679	T. 5 N., R. 41 E., secs. 4, 9, 10, 16
	F 72680	T. 8 N., R. 26 E., secs. 12, 13
	F 72681	T. 8 N., R. 27 E., secs. 7, 18

Robert R. Johnson, et al. secs. 10, 12, 22,
26, 27, 32-36

F 72673 T. 9 N., R. 35 E.,
secs. 18, 19,
30-32

F 72675 T. 7 N., R. 39 E.,
secs. 7, 18, 19

81-404 F 72691 T. 8 N., R. 27 E.,
William T. Engwall, et al. secs. 17, 22, 26,
27

81-412 F 72739 T. 8 N., R. 33 E.,
John P. Culhane secs. 23, 27

81-413 F 72742 T. 6 N., R. 24 E.,
Carl W. Lind secs. 5-8

81-414 F 72740 T. 8 N., R. 33 E.,
Gerald J. Culhane secs. 14, 22

81-415 F 72741 T. 8 N., R. 34 E.,
Michael W. Morey secs. 2, 12

81-416 F 72738 T. 8 N., R. 33 E.,
Thomas R. Culhane secs. 21, 28

81-425 F 72745 T. 7 N., R. 29 E.,
Paul N. Johnson, et al. secs. 11, 12,

14-16, 18, 19,

S 1/2 of sec. 17

F 72746 T. 8 N., R. 26 E.,
secs. 25, 36

F 72747 T. 8 N., R. 34 E.,
secs. 1-12

F 72748 T. 9 N., R. 33 E.,
sec. 22 and S 1/3
of sec. 15

81-439	F 72676	T. 7 N., R. 39 E.,
Sherman G. Reynolds		secs. 16, 17, 30
81-456	F 72743	T. 8 N., R. 35 E.,
Raymond E. Plummer, Jr.		secs. 18
	F 72744	T. 7 N., R. 38 E.,
		sec. 30
81-468	F 72668	T. 9 N., R. 33 E.,
Duane R. Gorder		secs. 13, 14, 23,
		24
	F 72669	T. 7 N., R. 39 E.,
		secs. 27, 28, 33,
		34
81-475	F 72692	T. 8 N., R. 28 E.,
Lloyd Swenson		sec. 30 and 160
		acres in sec. 29
81-565	F 72821	T. 8 N., R. 38 E.,
J. Michael Schachle		secs. 27-29
	F 72822	T. 8 N., R. 33 E.,
		secs. 2, 12
	F 72823	T. 7 N., R. 30 E.,
		secs. 1, 12 81-576
Kevin R. Gorder	F-72819	T. 9 N., R. 25, E.
		onshore acreage
		in secs. 5, 7-9

